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IN THE

# Supreme Court of the United States

OCTOBER TERM, A. D. 1946.

No. 1[redacted] 117

IN THE MATTER OF
PEER MANOR BUILDING CORPORATION,
Debtor.

W. D. WITTER AND JOSEPH WILLENS,
Petitioners,

*vs.*

G. J. NIKOLAS, ET AL.,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

## PETITIONERS' REPLY.

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# INDEX.



## Cases Cited.

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**No. 1254**

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## PETITIONERS' REPLY.

### STATEMENT.

Faced with a joint petition for the granting of the writ of certiorari by Witter who was a party to the proceeding below, and by Willens, who acquired the title to the property in a foreclosure proceeding which respondents *admit* was within the jurisdiction of the State Court, the respondent well aware that, because on their appeal they failed to file a supersedeas, the title of Willens, a

stranger to the proceedings, is unassailable both under State and Federal law, respondents confined their answer to the petition of Witter. Not one word is to be found in their answer to the argument of petitioner Willens. *This alone is sufficient for the granting of the writ.*

## A.

## Respondents' "Facts".

The undisputed "fact" that the Federal Court was in possession under a *void* order during the short period from June 18, 1942, to September 21, 1943, did not justify, as respondents urge (pp. 3-4), the statement in the opinion that "the management of the property has been under the tutelage of the District Court ever since the petition was filed". The Federal Court *was never in possession under the petition.* After its ouster, (134 F. (2d) 839), the possession was returned to the State Court, which *remained* in possession from September 21, 1943, to the date of the approval of the petition on March 13, 1945.

The contention (p. 5) that the "only matter set up in the Answer" of Witter contesting the "good faith" that "was not already set up" in the Answer of Peer was "the completion of the partial foreclosure", is contrary to the record. Witter's Answer alleged (Tr. 6) that the property was not owned by the corporation since February 8, 1944, and there was nothing to reorganize, liquidate, or rehabilitate. *This was a new issue.* He further alleged that no restraining order was issued under Chapter X and the conveyance resulting from the sale on February 8, 1944, *was before the approval of the petition.* This issue does not appear in Peer's Answer. He also alleged (Tr. 6) that no Plan of Reorganization could be

effected under section 146 (3). *This issue was not raised in Peer's Answer.*

Witter's Answer also alleged the pendency of the complete foreclosure in the State Court and the absence of a showing that the foreclosure was inadequate to grant the relief as required under Section 146 (4); that (Tr. 7) since the Plan of Reorganization contemplates a *liquidation* and *not* the reorganization of the Debtor *as a going concern,* the petition was *not* filed in "good faith". The Answer denied (Tr. 8) that the creditors would be obliged to sacrifice their claims if there were a liquidation in a State Court, and *affirmatively* stated that real estate values are considerably enhanced at this time, and that that type of reorganization can be procured in the pending State Court proceedings. *None of these issues were even mentioned in the Peer Answer.*

The inconsistency of respondents appears from the fact that when they desire to supply a fact which does not appear in the printed record they resort (p. 4) to the former record which is on file in this Court, but when they are in no position to justify *fatal defects* in their petition, they about-face, saying: (p. 6) "This petition" (the petition for reorganization) "is not included in the record" and "hence, is not properly before the Court". The record contains (Tr. 39) a stipulation that the Transcript of Record in Case 8472 "need not be printed"; and that other documents which appear in that printed record need not be reprinted and that the parties may refer to that record. The petition for reorganization *appears in that record* (pp. 2-10) which is also on file in this Court (No. 404) of which this Court takes judicial notice (*Nahdel Corp.* v. *West Virginia Pulp & Paper Co.,* 141 F. (2) 1, 2; *Alabama City etc.* v. *Bates,* 155 Ala. 347, 351). There is, therefore, "drawn into consideration"

the "contention" that petitioning creditors proposed a new corporation to be created for the purpose of acquiring all of the assets of the Debtor for the *exclusive* benefit of the first mortgage bondholders, and the question, therefore, is *properly* before the Court.

Respondents reiterate (p. 6) their assertion that "the petition was not brought up" in this record in their attempt to evade the *fatal* defects of their petition which did not plead "the need for relief under Chapter X", which petition is in the record as shown above. In the next breath they say that the petition *"is in the record* in Case No. 404", but that the question "was put in issue" on the hearing concerning the jurisdictional question. Whether or not the question was put in issue on the hearing of the jurisdictional question is of no importance, because a *determination* of a jurisdictional question *is not a determination on the merits.* (*Topping* v. *Frey,* 147 F. (2) 715, 717; *Electrotype Co.* v. *Grand Rapids Co.,* 256 Mich. 311, certiorari denied 286 U. S. 545; *Smith* v. *Johansen,* 236 Ill. App. 339, 343.)

It is contended that certain exhibits appear in Case No. 404 which support the "good faith" of the petition and these exhibits are not in the record. The Court of Appeals at first reached such a conclusion (Tr. 61). However, after it was demonstrated in the petition for rehearing that these exhibits *were in the record* and were printed (Tr. 5), the Appellate Court was *forced to admit its error* and to say that the exhibits were before it, and that it considered the exhibits (Tr. 95). The argument, therefore, is completely without merit, particularly, when *all of the documents appear in the record* which was on file in the Court of Appeals and is on file in this Court.

## B.

## The "Questions Presented".

**The First Question:**

Respondents contend (p. 7) that the five questions presented in the petition are "spurious and do not properly arise on the record". They say in order not to "engage in shadow-boxing on false issues", the *first* question "is not properly raised on this record and is a false issue", because of the finding of the court that "a reorganization was feasible". The *absurdity* of the contention is apparent. The object of a review is to have the upper court *determine the correctness of the decision below.* A "finding" below does *not* eliminate the question on review. The question of *feasibility* was not before the trial court nor before the Court of Appeals on the issue of "good faith". As a matter of fact the Master in Chancery found on the issue of "feasibility" that the plan of the Debtor was *not feasible* (Tr. 54).

**The Second Question:**

Respondents further say (p. 8) that another "false issue" is raised by the *second* question "whether it was proper to approve an involuntary petition as filed in good faith in the face of an answer contesting good faith without requiring the petitioners to prove the specific facts as requred in Sections 130, 131 and 146 of Chapter X". This alleged *falsity* of the question is based on the *false assertion* that this is "an academic issue" because of the finding of the trial court that these facts have been proven, and on the contention that if petitioner wished to test this issue he should have "raised the question as to whether there was evidence proving such facts". We have already shown that the finding of the

trial court does not remove the question from a review by the upper court. The assertion that the question was not raised is *false,* and the *falsity appears from the record* (Tr. 12), where it was expressly urged that *"there is no evidence adduced here as to the good faith".*

**The Third Question:**

After quoting the *third* question (p. 8) respondents say "a proper question" is raised by the first part of the question: "whether an involuntary petition for corporate reorganization under Chapter X was properly approved as filed in good faith when it appeared that the assets of the Debtor were less than the amount due on the first mortgage bond issue and that no conceivable plans could be adopted whereby equity owners and other creditors could participate in the reorganization", if there had been presented to the Court "sufficient record" to show that no conceivable plan could be adopted. Not only does the record present the petition which *on its face shows that no conceivable plan could have been adopted* for the benefit of other creditors or stockholders, but the Master *found* on the hearing concerning the plan that *no conceivable plan could be adopted* which would benefit any of the stockholders or other creditors, except the first mortgage bondholders.

They say that the last part of the question is "based upon an *assumption* that there was no showing that the State Court proceeding was inadequate to grant relief. They urge that this is contrary to the finding of the Court. The argument is again built on false premises that a finding destroys the presentation of the question for review. The question whether the finding is supported by any evidence is not determined by the finding, but by the evidence (*Chatz* v. *Armour Plant Employees' Credit Union,* 154 F. (2) 236, 239).

**The Fourth Question:**

The contention (p. 9) that the *fourth* question is not properly presented because the Master's Report was not before the trial court when it entered the order of good faith is completely without merit because the writ of certiorari is sought to review the judgment of the Court of Appeals, and the Master's Report was *properly presented and considered by that Court.*

**The Fifth Question:**

Respondents concede that the *fifth* question states a correct issue.

Their contention that all of the other questions are not before the Court is completely without foundation as shown above, and their desire to *escape* the other questions is due to their inability to find an answer.

**C.**

**The "Argument".**

Being in no position to sustain the decision below, respondents advance the argument (p. 11) that the Court of Appeals did *not hold* that the completion of the partial foreclosure was *void,* but that it was only *voidable,* depending on the outcome of the appeal which did not operate as a supersedeas. Under this admission the title of Willens, one of the petitioners, was unassailable and there was nothing to reorganize and this alone is sufficient for the granting of the writ.

In answer to the point that in the absence of a restraining order or a supersedeas there was no pending proceeding, counsel say (p. 15) that an "appeal" operates as a continuance of the suit. The pendency of proceedings for *appeal purposes* does not operate as a "pending

case" when referred to in an independent proceeding in another court (*General Tennessee Corp.* v. *Penn. Nat. Hardware,* 17 F. (2) 383, 384) and even where a supersedeas is granted *it does not affect the finality of the decree or order* in relation to another suit based on such order (*Huron Corp.* v. *Lincoln Co.,* 312 U. S. 183, 189). There was, therefore, no justification for the statement in the opinion that the completion of the partial foreclosure was "a fraud on the Bankruptcy Court" which dismissed the case for want of jurisdiction, particularly, when there was *no supersedeas.*

Respondents say (p. 15):

> "The logical conclusion is that the State Court had jurisdiction to act on the subject matter, if its jurisdiction had not been supplemented by the Bankruptcy Court. However had the ultimate conclusion been that the Bankruptcy Court was without jurisdiction, the action of the State Court would have been valid; but since it was ultimately concluded that the Bankruptcy Court did have jurisdiction from the time of the petition, then the action of the State Court became voidable "and hence, the Circuit Court of Appeals was justified' in finding that the completion of the partial foreclosure was 'an attempted fraud upon the court'."

We know of no case where the decision of a State Court which "had jurisdiction" is "voidable" depending upon an appeal in another case which did not even operate as a supersedeas. Respondents also lost sight of the fact that the title was conveyed to petitioner Willens, a *stranger* to the proceedings before the reversal, and in the *absence of a supersedeas his title was not voidable* (*Finlen* v. *Skelly,* 310 Ill. 170, 179; *Barnard* v. *Michael,* 392 Ill. 130).

The Answer of respondents (pp. 16-18) to Point I (b) of the petition (pp. 22-23) is completely devoid of merit and does not warrant a reply.

The distinction between an appeal which operates as a supersedeas and an appeal which does *not* so operate was not invented by these petitioners, but is the *distinguishing feature* which *this Court* made in *Union Joint Stock Land Bank* v. *Byerly,* 310 U. S. 1, and *Wayne United Gas Co.* v. *Owen-Ill. Glass Co.,* 300 U. S. 131. This is also the State law.

Respondents evade the point that the decision in the instant case that the petition was filed in good faith in the face of the contest at the outset when it appeared that the property was valued less than the first mortgage bond issue and there was nothing for creditors or stockholders to participate in the reorganization, is in conflict with the decisions of this Court as construed by other Circuits, and say (p. 28) that it is "an academic issue" and that "the merits need not be determined". They do not deny that the decision is *irreconcilable* with the decision of this Court as construed by other circuits. They contend that their petition did "not allege that the property should be liquidated", but merely *suggested* that "liquidation of the assets was the only alternative to reorganization under Chapter X" and they suggested a plan for giving stock to the first mortgage bondholders and that nothing of value be given to the parties having interests junior to the first mortgage bondholders" and also suggested "that the business be carried on under corporate structure and that the value of the assets be preserved by avoiding liquidation". The references to the pages in their petition (which printed petition appears in Case No. 404 heretofore filed in this Court) conclusively demonstrates that the proceeding was ini-

tiated to *eliminate all creditors and stockholders* and to *liquidate* the property for the sole benefit of the first mortgage bonds. At page 8 of the petition they alleged that they had "formulated a plan" which contemplated the exchange of the first mortgage bonds for the common stock to be issued by the reorganized corporation, *leaving nothing for other creditors and* stockholders because there was *no equity for them.* The petition stated that in order to effectuate a feasible reorganization the secured indebtedness "must be liquidated". The issue is, therefore, not academic.

Answering the point that the petition was fatally defective in the jurisdictional allegation of "good faith" which failed to allege that the pending proceeding was inadequate, and the failure to *prove* the inadequacy of the prior proceedings, respondents say that their petition *did* allege the inadequacy of the prior proceeding and the need for relief. Mere conclusions are insufficient and the facts were not alleged. Even a factual allegation is insufficient if not supported by proof when contested by answers. Instead of offering proof at the hearing, respondents are now offering an "argument". They may not substitute their "argument" for "proof". The jurisdictional issue as to the allegations having been challenged by the answer it was the duty of the respondents to "establish" the allegations by "proof". *Schefler* v. *Schefler,* 155 F. (2) 221, 222. Their "argument" to the contrary is refuted by the decision in the *Sheridan-View* case where the Seventh Circuit decided that under the Illinois law, a reorganization plan could be approved in the State Court to the same extent as it could be under Chapter X.

Respondents state (p. 27) that the Findings of Facts which were alleged and proved are set forth in the opinion of the Circuit Court of Appeals*. Findings of Facts

* The Court of Appeals was without jurisdiction to resolve question of fact with respect to which the ~~bondholders~~ Court below made no findings (Bowles v. Hayes, 155 F. (2) 351).

that have no support in the evidence are of no avail and are open for examination on appeal where they are challenged as unsupported by evidence (*Chatz* v. *Armour Plant Employees' Credit Union*, 154 F. (2) 236, 239). Realizing that there is no support in the record for the findings, respondents resort to the contention that the transcript does not contain all of the evidence and they say that this Court cannot rely on the Clerk's certificate. They had a chance when the Designation of the Record was served upon them to *supply any alleged facts* and their failure to do so indicates that there were no other facts to be supplied. *No such contention was ever made below* and this contention is, therefore, unavailable to them now.

The contention (p. 27) that the trial court heard evidence concerning the motion to dismiss the petition for want of jurisdiction on the Answer of Peer and that under Section 545 an issue raised in an answer which was tried "and finally determined is conclusive upon a subsequent answer filed by another creditor", is completely without merit because there was no determination on the merits when the court dismissed the proceedings for want of jurisdiction.

The "Findings of Fact and Conclusions of Law" on the previous hearing were (1) on the question of jurisdiction which was decided adversely to the Debtor on the first appeal; and (2) whether the evidence showed that the Debtor was an unincorporated company. The court found (R. 404, p. 63): (1) that the issue whether the Debtor was a corporation was adjudicated on the first appeal and the adjudication that it was not a corporation constituted *res judicata;* and (2) *that the court was without jurisdiction of the subject matter.* Having decided that it had no jurisdiction, it could not have decided the facts on the merits of the case. The contention that the facts set forth in Peer's Answer were all decided is therefore *baseless.*

A court cannot decide the merits of a case when it has no jurisdiction of the subject matter and all it can do is to direct the dismissal of the proceedings (*Jones* v. *Brush*, 143 F. (2) 733).

Respondents say (p. 28) that petitioners incorrectly assert that no evidence was offered in support of the petition excepting the record on the former appeal which was attached as Petitioners' Exhibit I. They concede that this is the only evidence that they offered but they say that this record "was not brought up, nor were Exhibits I-a, I-b or I-c, which were excused from printing in case No. 8472 reprinted. The only evidence that they offered in the trial court was the printed record in No. 8472 as it then stood (Tr. 13). Exhibits I-a, I-b and I-c were not printed and the court did not have these exhibits.

Faced with the Master's Report, who found *after hearing evidence* that the petition was *not filed in good faith;* that no feasible plan could be adopted for reorganization, and who recommended the *vacation of the order approving the petition as filed in good faith,* counsel resort to the technicality that the printed record does not contain the signature of the attorney for the petitioners to the motion and verification. To overcome this technicality we are supplying a certified copy of the original which was filed in Court, containing the signature and verifications.*

It is urged (p. 31) that the Master in Chancery was without jurisdiction to determine the merits while the matter was pending on appeal. This was the position of the petitioners herein (Tr. 45-46) but it was the respondents who prevailed upon the District Court to direct the Master to proceed with the hearing over petitioners' objection. The parties who urged that the jurisdiction existed are *estopped* to contend on appeal that jurisdiction

* See Appendix "A".

was lacking. (*Schulte* v. *Douglas*, 90 Conn. 529.) Having taken one position below they cannot take a different position on appeal (*Irongate Bank* v. *Brady*, 184 U. S. 665, 668; *Davis* v. *Wakalee*, 156 U. S. 680, 689. The respondents proceeded before the Master on their "plan" in disregard of the appeal. The fact that the Master decided that their petition was not filed in good faith and that no conceivable plan could be adopted, does not give them the right to urge here that the Master was without jurisdiction. This is contrary "to the first principle of justice". (*Davis* v. *Wakalee, supra.*)

## Conclusion.

Petitioners have demonstrated that the opinion below is in conflict with the decisions of this Court and with the decisions of other circuits. There is no denial in respondents' Answer that a conflict exists. Therefore, the writ should be allowed.

Respondents realize that they have no defense to the petition of Joseph Willens who acquired the title to the property in a foreclosure case of which it is now *conceded* that the State Court had jurisdiction. No supersedeas was filed. Petitioner Willens was a stranger to the proceedings. He should not be compelled to go through with a costly litigation in the District Court and in subsequent appeals when the record presented to this Court shows that he was the absolute owner and he was not even made a party to the proceedings, and that the Debtor's title was

completely wiped out by the foreclosure which ripened into a deed and a conveyance to the third party. It follows that the writ should be awarded.

Respectfully submitted,

MEYER ABRAMS,
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Attorneys for Petitioners.

## APPENDIX "A"

Motion of W. D. Witter filed in the United States Circuit of Appeals in the above matter, contains the signature of Harold J. Green, the attorney for the appellant.

The suggestions in support of the motion contains the signature of Harold J. Green as the attorney for the appellant, and is acknowledged on January 26, 1946, by P. Ruder, Notary Public.

The report of the Master in Chancery is signed by Charles A. McDonald, Master in Chancery, United States Circuit Court.

There is attached thereto a certificate by the Clerk of the United States Circuit Court of Appeals, dated July 18, 1946, certifying that the document containing the motion, suggestions, and verification is a true copy of the original which was filed in that Court on January 26, 1946.